NO. 22154

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARL JESS HANSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I.

JURISDICTIONAL STATEMENT

This is an appeal from the order of the United States District Court for the Southern District of California denying appellant's motion to vacate sentence under Title 28, United States Code, Section 2255.

The District Court had jurisdiction by virtue of Title 28, United States Code, Section 2255. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Section 1294 and 2255.

II.

STATEMENT OF THE CASE

On January 6, 1965, appellant was indicted in a three-count indictment which alleged the commission of three separate bank robberies [C.T.28].[1/]

1/ "C.T." refers to the Clerk's Transcript of Record.

Counsel was appointed for appellant. A psychiatric examination was requested by the defense and was ordered by the United States District Court for the Southern District of California [C.T.28].

On January 25, 1965, during a hearing in United States District Court, both parties submitted the matter upon the report of the psychiatrist, Dr. John D. Robuck, and the Court found that appellant was mentally ill but not legally insane and that appellant understood the proceedings against him and was properly able to assist in his own defense [C.T.28-29].

On the same date, appellant entered a plea of guilty to Count One of the indictment, which alleged that on or about September 8, 1964, in the Southern District of California, appellant, by intimidation, knowingly and wilfully took, from the person and presence of Suzanne Flinn, approximately $2,329, belonging to, and in the care, custody, control, management, and possession of, a savings and loan association whose accounts were then insured by the Federal Savings and Loan Insurance Corporation [R.T. 3-4].[2/]

Thereafter, on January 29, 1965, appellant was sentenced to the maximum period of custody and for a study under Title 18, United States Code, Section 4208(c). Additional psychiatric examinations were ordered after the

---

2/ "R.T." refers to the Reporter's Transcript of Proceedings, which was included in the record upon appeal [Second page of Certificate of Clerk, Clerk's Transcript of Record]. As there is a duplication of page numbers in the Reporter's Transcript, all references will refer to the proceedings of January 25, 1965, unless otherwise noted.

study was completed. On July 20, 1965, at a second hearing upon questions of mental competency, the trial Court found that appellant was mentally ill but competent to stand trial and was able to cooperate with his counsel and to understand the nature of the offense. The sentence was then modified to a period of 15 years with eligibility for parole at any time under Title 18, United States Code, Section 4208 (a)(2) [C.T. 29-30; R.T. 2-4].

On March 2, 1967, appellant filed a motion to vacate sentence under Title 28, United States Code, Section 2255, alleging that he was mentally incompetent at the time of arraignment, plea, and sentence [C.T. 2, 4]. This motion was denied without a hearing on March 2, 1967 by United States District Judge James M. Carter. (The motion had previously been lodged with the Clerk on February 6, 1967) [C.T. 28, 31].

On March 20, 1967, appellant filed a petition for rehearing. This petition was denied on April 11, 1967 [C.T. 33, 48].

Appellant thereafter filed a notice of appeal [C.T. 49].

III.

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

"I. Was appellant mentally incompetent at the time of arraignment, pleading, and sentence?

"II. Was appellant entitled to a full evidentiary and adversary Competency hearing pursuant to Sec. 4244 of Title 18, United States Code?

"III. Did the Court err in failing to rule on Constitutional aspects of Sec. 4244?

"IV. Did the Court err in failing to exercise Rule 28 of the F. R. Crim. P.?

"V. Did the method and extent of psychiatric examination meet the standard required?

"VI. Did the Court rely on Sec. 4208 (c) of Title 18, United States Codes, instead of on Sec. 4244?

"VII. Did the Court fail to recognize authorities cited in appellant's Sec. 2255 brief?

"VIII. Did the Court err in accepting a plea of guilty after a question of innocence was raised?

"IX. Did the examining psychiatrists err in reporting on both competency to stand trial and responsibility at time of alleged offenses?

"X. Did the Court abuse its discretion in holding appellant competent to stand trial?

"XI. Did the Court err in failing to cause the plea of guilty to be withdrawn?

"XII. Did the Court err in failing to rule on the proposition that due to actions taken by the U. S. Probation Officer the plea was not voluntary as required by Rule 11 of the Federal Rules of Criminal Procedure?

"XIII. Did the Court err in failing to make findings of fact and conclusions of law in its orders of March 2, 1967 (R. 28-31), and

April 11, 1967 (R. 48)?"

(Appellant's Brief, pp. 4-5).

IV.

STATEMENT OF THE FACTS

Appellant committed a robbery of the Central Federal Savings and Loan Association in San Diego, California, on or about September 8, 1964. He accomplished the robbery by handing a note to a teller or a young woman. The note stated, among other things, that appellant had a gun. The woman gave appellant approximately $2,329, and he left [R.T. 4-6].

A psychiatric examination was ordered at the request of the defense, and the psychiatrist, Dr. John D. Robuck, concluded that appellant was mentally ill but not legally insane, understood the proceedings against him, was properly able to assist in his own defense, and was not legally insane at the time of the alleged offenses. The report of Dr. Robuck was filed on January 19, 1965 [C.T. 28-29].

On January 25, 1965, a hearing was held upon the questions of mental competency, and the matter was submitted upon the psychiatrist's report by agreement of Government counsel and appellant's counsel [C.T. 28; R.T. 2]. The trial court found that appellant was presently mentally ill but not legally insane, that he understood the proceedings against him, and that he was properly able to assist in his own defense [R.T. 2-3].

On the same date (January 25, 1965), appellant entered a plea of guilty to Count One of the indictment and stated that he had committed the alleged robbery by using a note which began with the words, " I have a gun in

my shirt . . . ." [R.T. 3-6]. The prosecuting attorney announced that the Government was satisfied by a guilty plea to one count [R.T. 4].

After a period of study at Springfield Medical Center, appellant was returned to court. Additional psychiatric examinations by Dr. Robuck and Dr. Alfred L. Larson were ordered by the Court on June 16, 1965. The orders provided that the report and study from the Springfield Medical Center would be furnished to each of the examining psychiatrists. Dr. Robuck's report was filed on June 25, 1965, and Dr. Larson's report was filed on July 13, 1965 [C.T. 29-30].

Dr. Robuck stated that appellant was mentally ill but probably not legally insane, that he understood the proceedings against him, and that he was able to properly assist in his own defense [C.T. 29-30].

Dr. Larson stated that appellant was legally insane, was probably insane at the time of the commission of the alleged offense, and was able to comprehend the proceedings but unable to cooperate in his defense [C.T. 30].

The second hearing upon the question of appellant's mental condition was held on July 20, 1965. Appellant again was represented by counsel. The matter was submitted upon the medical reports. The court found that appellant was mentally ill but competent to stand trial at that time and at the time of plea, that he knew the nature of the proceedings, that he was able to cooperate with counsel, and that he was not legally insane at the time of the crime [R.T. 2-4, July 20, 1965].

Appellant's motion to vacate sentence was denied on March 2, 1967 [C.T. 28-31].

V.

ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE OF APPELLANT'S MENTAL COMPETENCE AT THE TIME OF ARRAIGNMENT, PLEADING, AND SENTENCE.

Appellant suggests that he was not mentally competent at the time of arraignment, pleading, and sentence. However, in ruling that appellant was mentally competent, Judge Carter relied upon the reports of Dr. Robuck, which reports were properly considered, since the matter was submitted upon the various reports during the hearings of January 25, 1965, and July 20, 1965 [R.T. 2-3; C. T. 28-30].

Judge Carter's findings of fact were adverse to appellant upon the questions of legal competence at the time of plea and time of sentence [R.T. 3-4, July 20, 1965].

"Findings of fact cannot be set aside by an appellate court unless clearly erroneous."

Hearn v. United States, 194 F.2d 647, 649 (7th Cir. 1952) (Emphasis added).

> "The issues of fact raised by the motion to vacate the judgment and sentence and to withdraw the plea of guilty were for the trial court to resolve, and its decision may not be overturned on appeal unless it is clearly erroneous and constitutes an abuse of discretion."

Harris v. United States, 216 F.2d 953 (5th Cir. 1954).

Since the trial court's findings of fact were based upon the opinion of an expert, and since evidence upon appeal is viewed in the light most favorable to the prevailing party in the trial court, it is evident that the trial court's findings were not "erroneous."

B. APPELLANT WAS NOT DENIED THE RIGHT TO A FULL EVIDENTIARY AND ADVERSARY COMPETENCY HEARING.

It appears that appellant did not have an absolute right to a full evidentiary and adversary hearing upon the question of competency.[3/] However, appellant had two competency hearings with his counsel present to assist him. By agreement of the parties, the evidence was limited to the various reports of experts. [R.T. 2; R.T. 3, July 20, 1965]. A similar procedure was approved in Merrill v. United States, 338 F.2d 763, 766 (5th Cir. 1964).

A party may not be compelled to present evidence if he does not wish to do so. It is quite possible that appellant and his counsel desired a finding of competency, because appellant had the opportunity of settling the case with a plea of guilty to one of three separate bank robbery counts [R.T. 4; C.T. 28], thereby avoiding the problems described by appellant when he

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3/ Stone v. United States, 358 F.2d 503, 506 (9th Cir. 1966); Formhals v. United States, 278 F.2d 43, 48 (9th Cir. 1960); Institutes on Sentencing, 37 F.R.D. 155, 160 (1965).

states that "Movant faced three bank robbery indictments, and sixty years imprisonment - - a life sentence for a man of his age." (Appellant's Brief, p. 12).

> "A guilty defendant must always weigh the possibility of his conviction on all counts, and the possibility of his getting the maximum sentence, against the possibility that he can plead to fewer, or lesser, offenses, and perhaps receive a lighter sentence." Cortez v. United States, 337 F.2d 699, 701 (9th Cir. 1964).

Appellant contends that acceptance of "waiver" of the competency hearing was erroneous, citing Durham v. United States, 214 F.2d 862 (C.A. D.C. 1954). Durham does not fully support appellant's position. Furthermore, there was no waiver of the hearing in the instant case, as the matter was submitted upon the evidence, which consisted of medical and psychiatric reports. A similar procedure was approved in Merrill, supra.

Appellant states that he was entitled to an adversary hearing. He had not one, but two, adversary hearings upon the question. He was represented by counsel, who could have offered additional evidence had he desired to do so.

Appellant contends that he was not "present" at the competency hearings, apparently upon the theory that he was not mentally "presemt" because he was allegedly insane at the time. However, he cites no legal authority to support the extraordinary proposition that no hearing can ever be held upon an insane person, because he is entitled to be "mentally present" at the hearing, and cannot be "mentally present" because he is insane. Such a rule

would prevent the operation of 18 U.S.C.A. 4244. It obviously was not the intention of Congress to pass a silly statute. (This argument concerns appellant's claim that he was insane. The evidence credited by the trier of fact demonstrated that he was not insane).

C. THE LACK OF A RULING CONCERNING CONSTITUTIONALITY OF 18 U.S.C.A. 4244 DID NOT CONSTITUTE ERROR.

Appellant contends that the trial Court should have ruled upon the Constitutionality of 18 U.S.C.A. 4244, as the statute is "non-adversary" in character unless the psychiatric report indicates the need for a hearing. However, appellant has no standing to object to the alleged unconstitutionality of a provision of a statute which was not enforced against him. He had two adversary hearings upon the issues.

D. FAILURE TO APPLY RULE 28 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE DID NOT CONSTITUTE ERROR.

Appellant states that the trial Court violated Rule 28 of the Federal Rules of Criminal Procedure by failing to inform an expert psychiatrist of his duties by means of a "conference."

Assuming, arguendo, that Rule 28 applied to psychiatric examinations under 18 U.S.C.A. 4244 prior to the 1966 amendment of Rule 28, it is respectfully submitted that appellant was not prejudiced by failure to have a conference, as he had the opportunity of calling the psychiatric experts as witnesses and cross-examining them if he wished to do so. This procedure would have

cured any supposed defect in the failure to have a "conference." Since there was no prejudice, the error, if any occurred, falls within the confines of Rule 52(a), Federal Rules of Criminal Procedure:

"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Furthermore, appellant did not make a timely request for a "conference." The request came in 1967 [C.T. 13, 25]. The hearings occurred in 1965.

E. THERE IS NO EVIDENCE THAT THE PSYCHIATRIC EXAMINATIONS WERE IMPROPERLY CONDUCTED.

Appellant asserts that the psychiatric examination by Dr. Robuck involved various defects, including the failure to have X-rays, brain wave tracings, electroencephalograms, Rorschach tests, etc. He states that the examination should have been postponed in order to obtain detailed records from Atascadero and Kansas. He claims that Dr. Robuck visited appellant for only 20 minutes. However, if appellant had any objections to the procedures which were used, he should have made a timely objection or should have utilized the procedures of summoning witnesses and cross-examination in order to obtain additional evidence, if appellant actually desired a finding of insanity and an indefinite commitment, rather than an opportunity to plead guilty to one of three bank robbery charges and gamble upon hopes of a light sentence.

It is a well-established rule that an issue must be raised in a timely fashion in the trial Court.

Ramirez v. United States, 294 F.2d 277,283 (9th Cir. 1961); Stein v. United States, 166 F.2d 851, 855 (9th Cir. 1948), cert. denied, 334 U. S. 844 (1948).

Failure to object in 1965 also precluded a 1967 determination (by means of 28 U.S.C.A. 2255) of the propriety of various other 1965 procedures, including the alleged use of medical standards rather than legal standards, the alleged failure to advise Dr. Robuck to follow Ninth Circuit legal standards, the alleged failure to distinguish between "true, and 'apparent' rationality," and the lack of a "'legal adjudication for restoration to sanity.'" If these questions were important, they should have been raised during the 1965 hearings. It certainly is not the purpose of 28 U.S.C.A. 2255 to relitigate competency issues upon which two complete hearings have already been held.

Appellant also states that the trial Court should have inquired whether appellant knew that his acts were wrong, whether he could have refrained from doing the acts, and whether the rule of "emotional forces" might be applicable. However, these questions were not essential, as the issue was not innocence or guilt. The issue was whether appellant was presently competent. While there was some consideration of the question of sanity at the time of the crimes [C.T. 2-3], this question was not in issue.

F. THE TRIAL COURT DID NOT IMPROPERLY RELY UPON 18 U.S.C.A. 4208(c).

Appellant maintains that the trial Court attempted to substitute the procedure under 18 U.S.C.A. 4208 in order to obtain answers to the questions

involved in the 18 U.S.C.A. 4244 proceedings. The record does not support this contention. The hearing under 18 U.S.C.A. 4244 was completed and appellant was found to be competent four days before appellant was sentenced uner 18 U.S.C.A. 4208(c) [C.T. 29]. The latter statute provides for a study and report with recommendations concerning suitability for parole. The statute provides as follows:

> "This report may include but shall not be limited to data regarding the prisoner's previous delinquency or crominal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent."
>
> 18 U.S.C.A. 4208(c).

It is self-evident that the primary purpose of this statute is not to provide a psychiatrist study, but rather to furnish information that may be valuable upon the question of sentence or parole. Appellant's counsel originally requested the study [R.T. 6], so it is somewhat surprising that appellant claims that the trial Judge attempted to rely upon the study as "a fishing expedition . . . ." (Appellant's Brief, p. 21).

Judge Carter did not rely upon this report during the Section 4244 hearing, because the Section 4244 hearing was already completed at the time of the sentence under 18 U.S.C.A. 4208(c). At the second competency hearing, some consideration was given, without objection, to the report from the Springfield Medical Center [C.T. 30]. This was entirely proper, since the parties agreed to this procedure, and since the reports may have assisted

in arriving at the truth. There is no evidence to support appellant's novel suggestion that two psychiatric experts would be "confused" by the fruits of the Section 4208 examination.

G. THERE IS NO EVIDENCE THAT THE TRIAL COURT FAILED TO CONSIDER APPELLANT'S SECTION 2255 BRIEF.

There is no evidence supporting appellant's claim that the trial Court failed to recognize authorities cited in appellant's Section 2255 brief. Consequently, the contention has no merit in this appeal.

H. ACCEPTANCE OF A PLEA OF GUILTY DID NOT CONSTITUTE ERROR.

Appellant maintains that since Dr. Robuck's report allegedly stated that the crimes were committed in order to obtain relief from schizophrenic tendencies, this may have been a bar to the entry of a plea of guilty.

(Appellee takes issue with appellant's interpretation of Dr. Robuck's reports and does not concede that appellant has accurately related the opinions of Dr. Robuck).

It is not surprising that appellant cites no relevant authority[4/] to support the novel suggestion that a trial Court cannot accept a guilty plea where the defendant admits guilt, desires to plead guilty in the presence of his attorney, and has an opportunity to dispose of two bank robbery counts by means of compromise. If the court had forced appellant to trial against his wishes, he could have stipulated that he was sane at the time of the crime alleged in Count One, so what would have been accomplished?

I. THE REPORT CONCERNING CRIMINAL RESPONSIBILITY AT THE TIME OF THE ALLEGED OFFENSES DID NOT CONSTITUTE ERROR.

Although it was not necessary to determine whether appellant was criminally responsible at the time of the alleged crimes, the trial Judge received the opinions of the psychiatrists upon this question [C.T. 29-30]. This was a salutary procedure, avoiding the possibility that the psychiatrists

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4/ Appellant relies upon the dissenting opinion in United States v. Baldi, 192 F.2d 540 (3rd Cir. 1951). This dissenting opinion maintained that the defendant should have been allowed to withdraw a guilty plea, assuming the truthfulness of his allegations that his guilty plea was in exchange for promises allegedly broken by the court. It was claimed (at pp. 550-51, n.5) that the Court had promised that if certain records "raised an issue or doubt of Relator's sanity, the Court would consider withdrawal of the plea of 'Guilty'." This promise allegedly was broken.

would be required to withhold analysis of the question until many years later, had appellant been committed as presently incompetent. Had the question been left undetermined for several years, the psychiatrists might be forced to arrive at guesses, not conclusions, regarding criminal responsibility in the distant past. The additional psychiatric answers also would be helpful to all parties in determining whether they should proceed to trial.

However, appellant complains of this procedure, contending that the combination of the various questions would be "confusing" to the psychiatrists and to the trial Judge. There is no showing of confusion. There is no reason to believe that the distinguished trial Judge and the expert psychiatrists would have difficulty in considering the separate issues of present competency and criminal responsibility at the time of the alleged crimes.

J. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN HOLDING APPELLANT COMPETENT TO STAND TRIAL.

Appellant contends that the trial Court abused its discretion in holding that appellant was competent to enter a plea and be sentenced. He states that Dr. Robuck's report contained "an expression of doubt" and that Dr. Alfred Larson "was firm in his opinion" that appellant was insane (Appellant's Brief, p. 26). Appellant finds "doubt" in Dr. Robuck's employment of the term, "probably not legally insane" [C.T. 29]. In view of the vast uncertainties in the area of the mind, it is respectfully submitted that a psychiatric expert who speaks in terms of probabilities is entitled to far more respect, all other considerations being equal, than one who claims certainty

upon the question of present legal competence. Judge Carter's findings were fully supported by the evidence most favorable to the prevailing party.

K. FAILURE TO REQUIRE WITHDRAWAL OF THE PLEA OF GUILTY DID NOT CONSTITUTE ERROR.

The record does not indicate that there was any motion to withdraw the plea of guilty. In his contention that the plea should have been withdrawn, it is possible that appellant is repeating the arguments discussed under "H" above.

L. FAILURE TO RULE UPON THE PROBATION OFFICER'S EFFECT UPON THE GUILTY PLEA DID NOT CONSTITUTE ERROR.

Appellant argues that the trial court should have ruled upon his claim that the guilty plea was induced by the alleged promise of a probation officer (to appellant's wife) to the effect that a guilty plea would lead to the dismissal of two counts and "would open the way to immediate hospitalization and treatment." (Appellant's Brief, p. 24).

> "The important thing is not that there shall be no 'deal' or 'bargain', but that the plea shall be a genuine one, by a defendant who is guilty; one who understands his situation, his rights, and the consequences of the plea, and is neither deceived nor coerced."

Cortez, supra, at p. 701.

It is a commendable rule that where a guilty plea is induced by

broken promises, made by persons in authority to make such promises, the plea may be set aside. That is not the case here. Appellant does not claim that the Government broke any promises.

M. THE ALLEGED FAILURE TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW DID NOT CONSTITUTE ERROR.

Appellant states that the failure to make findings of fact and conclusions of law in the orders of March 2, 1967, and April 11, 1967, constituted error. There is no showing of prejudice to appellant by the alleged failure to make such findings and conclusions, and there is no showing that findings were requested.

However, the findings and conclusions of the trial Judge can easily be discerned in the four-page March 2, 1967, order denying relief and dismissing the petition [C.T. 28-31]. On April 11, 1967, the trial Judge denied appellant's motion for re-hearing [C.T. 48]. There was no need for findings of fact and conclusions of law at that time. 5/

5/ Appellant does not contend that he had the right to an evidentiary hearing upon the Section 2255 motion. However, he makes a brief reference to this matter, so it may be appropriate to cite Grill v. United States, 363 F.2d 32 (5th Cir.1966), holding that a Section 2255 hearing is not required after an 18 U.S.C.A. 4244 finding of mental competence, where there is no showing of a change in mental condition. There was no allegation of a change in mental condition in the instant case. Indeed, appellant claims that there is a presumption that he is still incompetent. (Appellant's Brief, p. 10).

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.
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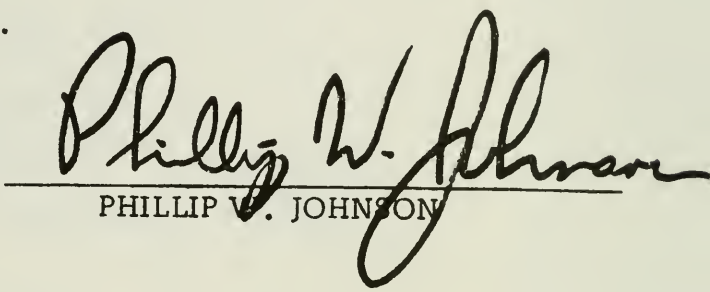
Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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